UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CORRECTIONS CORPORATION OF AMERICA	)	
Respondent,	)	
and	)	**Case No. 26-CA-23180**
VEVRIA NELSON, an individual	)	
Charging Party.	)	

RESPONDENT CORRECTIONS CORPORATION OF AMERICA'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

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Dated: May 1, 2009

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Respondent Corrections Corporation of America ("the Company") submits this Brief in support of its Exceptions to the March 27, 2009 Decision and Recommended Order of Associate Chief Administrative Law Judge William N. Cates ("ALJ") pursuant to Section 102.46 of the Board's Rules and Regulations.[1]

The ALJ's Decision is erroneous in several respects. As discussed below, the ALJ ignored relevant evidence, drew improper inferences from undisputed testimony, and misapplied Board law to conclude, incorrectly, that the Company violated Section 8(a)(1) when it discharged Vevria Nelson, the Charging Party. Accordingly, the Board should sustain the Company's Exceptions to the ALJ's Findings of Fact and Conclusions of Law, reverse the ALJ's Decision and Recommended Order, and dismiss the Complaint in its entirety.

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[1] The Administrative Law Judge's March 27, 2009 Decision will be designated as "ALJD page(s):line(s)". References to the hearing transcript will be abbreviated as "Tr. p. __"; and references to the General Counsel's exhibits and to Respondent's exhibits will be abbreviated as "GC Ex. __", and as "R. Ex. __", respectively.

I. INTRODUCTION

This case arises out of the Company's contested discharge of Vevria Nelson ("Nelson"), the Charging Party. At its core, the case is simple: Nelson continually displayed repeated and unremorseful instances of anger, harassment, intimidation and bullying of other employees, insubordination toward her supervisors, and behavior disruptive to the Company's Medical Department. The Company consistently warned Nelson that, if she did not cease her bad behavior, she would be terminated. Contemporaneous to Nelson's misconduct, the Company was ordered to make drastic improvements to the Medical Department at the Tallahatchie County Correctional Facility ("the Facility") at which Nelson was employed; otherwise, the Company's contract with the California Department of Corrections and Rehabilitation would be terminated and the Facility would be closed. Nelson's disruptive behavior directly threatened the Company's operations at the Facility and its California contract; thus, the Company had no choice but to terminate her employment. It is abundantly clear and undisputed that Nelson engaged in behavior that violated the Company's Code of Conduct and that threatened the Company's California contract and its $57 million investment in the Facility.

Despite this undisputed evidence, the ALJ found that Nelson was terminated because of her concerted activity. The ALJ's decision, however, ignores relevant evidence and draws improper inferences from undisputed testimony. In addition to these factual errors, the ALJ incorrectly concluded that the General Counsel satisfied his initial burden to show that Nelson's concerted activities were a motivating factor in her discharge. The ALJ also erroneously concluded that the Company failed to show that it would have discharged Nelson even in the absence of her concerted activities by rejecting the undisputed evidence that Nelson was a disruptive employee. As discussed more fully below, these conclusions are inconsistent with the

record and with Board law. Accordingly, the ALJ's Decision should be reversed, and the Complaint should be dismissed in its entirety.

II. STATEMENT OF FACTS

As set forth in the ALJ's Decision, the Company, which is headquartered in Nashville, Tennessee, is engaged in the private corrections management industry. It specializes in the design, construction, expansion, and management of prisons, jails and detention facilities through contracts with all three federal corrections agencies (the Federal Bureau of Prisons, the U.S. Marshals Service, and Immigration & Customs Enforcement), nearly half of the states, and more than a dozen local municipalities. Its 65 facilities house approximately 75,000 offenders. At these facilities, its employees are engaged in security, academic and vocational education, health services, inmate programs, facility maintenance, human resources, management and administration (ALJD 2:18-21; 2:43–3:4).

The Company's Tallahatchie County Correctional Facility, at which Nelson was employed, is located in Tutwiler, Mississippi, and has approximately 610 employees (ALJD 3:17-18). The Company began managing the Facility in 2000 and, since then, has experienced repeated challenges with its operation (Tr. pp. 182-190). Specifically, in 2001, the Facility was closed for a period of time after the inmates from Wisconsin were removed (ALJD 15:5-7; Tr. p. 182). The Facility later re-opened and housed inmates from the Alabama Department of Corrections, who were eventually removed, and the Hawaii Department of Corrections (ALJD 15:7-8; Tr. p. 182). In mid-2007, the Company secured a contract with the California Department of Corrections and Rehabilitation (ALJD 15:9-12; R. Ex. 14; Tr. p. 182). To secure that contract, the Company committed to a $57 million expansion of the Facility and, accordingly, had to hire new employees (ALJD 15:14-16; Tr. p. 182). It also removed the Hawaii inmates from the Facility, to make room for the California inmates (Tr. p. 182).

The Company's contract with California is unique. As a result of overcrowding and health services issues in the California prisons, two federal judges actively monitor inmates of the California Department of Corrections and Rehabilitation, regardless of where they are incarcerated (ALJD 15:16-19; Tr. p. 184). A Trustee has been appointed for health services, and a Receiver supervises and monitors implementation of the federal court orders involving health services (ALJD 15:19-28; Tr. pp. 184-185). As part of its contract with the State of California, the Company is under the supervision of that Receiver (ALJD 15:30-34; Tr. p. 185). Periodically, the Receiver sends physicians and other medical professionals to conduct on-site audits of the health services provided to inmates at the Facility (ALJD 15:30-34; Tr. pp. 185-186). The Company does not operate any other correctional facility subject to such oversight (Tr. p. 186).

In April 2008, an inmate died at the Facility (ALJD 15:36-38; Tr. pp. 186, 250-252). As a result, the Receiver sent a Medical Operations Performance Team to the Facility to investigate the inmate's death (ALJD 15:38-41; Tr. pp. 186-187). The results of the investigation were "scathing" (ALJD 15:41-43; Tr. p. 188). The Receiver concluded that the Medical Department had not responded to the inmate's situation as required, and was in violation of the federal court orders (ALJD 15:43-46; Tr. p. 188). The Company was ordered to immediately correct the deficiencies in the Facility's Medical Department; otherwise, the California inmates would be removed (ALJD 15:46–16:2; Tr. pp. 189, 193, 252, 304-305). Such removal would force the Company to layoff the Facility's entire workforce, render the $57 million expansion useless, and jeopardize the Company's other contracts with California Department of Corrections and Rehabilitation (ALJD 16:2-6; Tr. pp. 189-190, 251-252).

The Receiver eventually agreed not to remove California inmates from the Facility, but refused to send additional inmates until certain deficiencies were corrected (Tr. p. 252). The Receiver and the Company created a Corrective Action and Remedial Plan designed to address the deficiencies—all of which related to the Facility's Medical Department (ALJD 16:8-14; R. Ex. 15, 16; Tr. pp. 191-194, 304-305). An immediate priority for the Medical Department was recruiting and hiring more physicians and registered nurses ("RNs"), in addition to those recently hired in connection with the Facility's expansion (ALJD 16:8-14; Tr. p. 192). Because of the critical state of the Facility's Medical Department, Regional Health Director Beverly Overton, who typically supervises health services at ten facilities, was re-assigned to supervise only those at Tallahatchie (Tr. p. 194).

A. Nelson's Employment with the Company

Nelson was employed by the Company for less than two years. She was hired on August 21, 2006, as a licensed practical nurse ("LPN") at the Company's Delta Correctional Facility, in Greenwood, Mississippi. At her request, Nelson was transferred, on January 24, 2007, to the Tallahatchie Facility, where she worked as an LPN/Infectious Diseases Coordinator, until her discharge on August 1, 2008. In that position, Nelson was responsible for monitoring infectious diseases, conducting tuberculosis tests on inmates and employees, and performing pre-employment health screenings for job applicants (ALJD 3:25-34).

While at the Tallahatchie Facility, Nelson's immediate supervisors were Clinical Nurse Supervisors Albert Maples and Calvin Stewart, who reported to Health Services Administrator Gloria Johnson, who is in charge of the Medical Department. In turn, Health Services Administrator Johnson reported to various Assistant Wardens, and Regional Health Director Beverly Overton (ALJD 3:18-19, 34-37). The Medical Department also employs Certified Nursing Assistants, LPNs, RNs, dentists, physicians, and various types of counselors (Tr. pp.

242-244). Overall responsibility for the management of the Tallahatchie Facility rests with Warden Robert Adams (Tr. pp. 34, 181, 231), who reports to Managing Director Jack Garner (ALJD 2:28).

B. Employee Complaints About Nelson

Nelson was described, at the hearing, by one of her former co-workers, as the "biggest, baddest bulldog that just barked all the time in your face and would never go away, that's what it was like working with her" (ALJD 20:10-13; Tr. p. 397). Nelson's disruptive behavior manifested itself in: alienating other members of the staff; bullying employees; making demeaning and condescending comments to other employees; physically assaulting another employee; refusing directives from her supervisors; making co-workers and supervisors cry; and making false accusations against co-workers and superiors (R. Exs. 49-57, 61-64, 67; Tr. pp. 34, 81, 231-239, 254-255, 258-259, 305-307, 312-313, 321-322, 329-332, 342-343, 347-348, 352-353, 356-360, 363, 374-378, 384-385, 397-401, 407-413). In sum, she created a toxic work environment, low morale, interfered with team work and productivity, and caused at least two RNs to quit (*Id.*), at a time when teamwork and cooperation within the Medical Department was critical to retaining the California contract. Nelson's disruptive behavior prompted the following complaints, among others:

- On March 15, 2007, Nelson physically accosted Mental Health Coordinator Mildred Ware as Ware arrived at work. Specifically, Nelson charged down the hall toward Ware, pointed her finger in Ware's face, berated Ware and demanded to know why Security would not give Nelson an office key. Corrections Officer Huddleston ordered Nelson to "get away" and "move back" from Ware, who feared for her physical safety. Ware submitted a written complaint against Nelson to the Company (ALJD 16:27-31; R. Exs. 50, 67; Tr. pp. 407-411).

- On August 20, 2007, Certified Nursing Assistant LaTonya Rushing placed a water bottle in the Facility's refrigerator, and later that day could not find it. Nelson told Rushing, in a harsh and negative tone, that she had thrown Rushing's water bottle away, to make room for her own water. Rushing submitted a written complaint against Nelson to the Company (ALJD 16:33-42; R. Exs. 61, 62; Tr. pp. 364-365).
- On October 10, 2007, LPN Percynthia Thomas walked into the Intake Department with some medication for the Chronic Clinic, when Nelson grabbed the medication out of Thomas' hand, in front of several nurses and Clinical Nurse Supervisor Albert Maples. Thomas was so upset by Nelson's conduct, that she submitted a written complaint to the Company (R. Ex. 63; Tr. pp. 385-387).[2]
- On October 13, 2007, Nurse Practitioner Tammy Taylor wrote to the Company complaining that Nelson created a toxic work environment, low morale, stress, interfered with teamwork, safety and productivity, and caused staff turnover in the Medical Department (ALJD 16:44–17:10; R. Ex. 49, Tr. p. 233). Taylor further complained that Nelson manipulated her relationship with Health Services Administrator Gloria Johnson to her advantage, alienated staff with verbal and written complaints, displayed authoritative behavior because of her relationship with Johnson and Clinical Supervisor Stewart, reduced staff members to tears, was not a team player, bullied timid employees, made demeaning comments and used condescending language toward others (*Id.*).
- On October 13, 2007, LPN Percynthia Thomas wrote to the Company and complained that Nelson was rude, unprofessional and disrespectful, called people stupid, verbally

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2 The ALJ failed to discuss this incident in his decision.

abused staff, and withheld vital information at the expense of the inmates' safety and health (R. Ex. 64, Tr. pp. 389-390).[3]

- On February 22, 2008, dentist Dr. Jerry Tankersley needed Ibuprofen for an inmate on whom he had just performed oral surgery. Dr. Tankersley asked Nelson, who was the only nurse in the Pharmacy at the time, for the medication. Nelson refused, was extremely rude and loud, screamed and yelled at Dr. Tankersley, and physically confronted him. In Dr. Tankersley's twenty-two years of dentistry, he had never been treated so poorly. As a result, he submitted a written complaint to the Company detailing the incident (ALJD 17:12-29; R. Ex. 51; Tr. pp. 339-343).
- On February 22, 2008, Nelson's immediate supervisor, Clinical Nurse Supervisor Albert Maples, intervened in Nelson's verbal attack on Dr. Tankersley, by instructing her to calm down or be sent home. Nelson then turned her anger upon Maples, and yelled at him. Maples submitted a written complaint to the Company detailing the incident (ALJD 17:12-29; R. Ex. 52; Tr. pp. 233-234, 330-332).
- On April 23, 2008, Clinical Nurse Supervisor Albert Maples resigned, and informed Warden Robert Adams that he was quitting because of Nelson's conduct (ALJD 19:26-44; Tr. pp. 245-248, 327-328).
- On May 21, 2008, RN Shakantayeri Scott was exiting a medical staff meeting, when she commented to her co-worker, LPN Charles Gray, "you're getting the evil eye." Nelson came up behind Scott, and yelled and screamed at the top of her lungs that she "don't play like that." Scott attempted to determine what Nelson was complaining about, when Nelson shoved her twice. LPN Gray and LPN Kim Watson had to separate Nelson from

[3] The ALJ also failed to discuss this incident in his decision.

Scott, who then left the Facility. Scott submitted a written complaint to the Company, detailing Nelson's physical attack on her (ALJD 17:31-41; R. Ex. 53; Tr. pp. 347-348).

- LPN Kim Watson witnessed Nelson's May 21, 2008, physical attack on RN Scott, and also submitted a written statement to the Company, confirming that Nelson had screamed at, and shoved, Scott (ALJD 17:39-41; R. Ex. 54; Tr. pp. 235-236, 352-353).
- On June 18, 2008, RN Deanna Hardin informed Warden Robert Adams that she was resigning due to the hostility that Nelson caused within the Medical Department (ALJD 19:46–20:4; Tr. pp. 248, 276, 400).
- On July 1, 2008, Human Resources Manager Victoria Holly submitted a written statement to the Company detailing a conversation about pre-employment health screenings between herself and Nelson, during which Nelson behaved very unprofessionally and falsely claimed that Holly was a liar (ALJD 17:43–18:5; R. Ex. 55; Tr. p. 236).
- On July 30, 2008, Clinical Nurse Supervisor Dorothy Strong asked the nurses about an inmate who had complained of chest pains. Nelson berated Strong in front of Strong's subordinates, called Strong nosey, and stated that Strong had no business asking about the inmate's medical condition. Nelson's conduct embarrassed Strong, and brought her to tears. Strong submitted a written complaint to the Company about Nelson's conduct, including that Nelson routinely made ugly remarks to, or about, the RNs (ALJD 18:7-20; R. Ex. 56; Tr. pp. 311-313).
- On July 30, 2008, Dr. Chester Layne witnessed Nelson berate Clinical Nurse Supervisor Strong, and also observed Strong crying as a result of Nelson's behavior toward her.

Dr. Layne submitted a written statement about the incident to the Company (ALJD 18:22-28; R. Ex. 57, Tr. pp. 236-237, 321-322).

C. Conflicts Dynamic Profile Training

In approximately March 2008, Warden Adams and Managing Director Garner began informing Vice President of Facility Operations Jimmy Turner of employee complaints that Nelson was disruptive to the Medical Department (ALJD 19:1-2; Tr. pp. 192-195, 239). The complaints about Nelson continued, even after the Company was under strict orders by the Receiver to dramatically improve the operations of the Medical Department (Tr. pp. 192-195). Because it was necessary for the medical staff to work cooperatively, to comply with the Receiver's mandates, and to deliver proper health services to inmates, Turner arranged for Senior Director of Human Resources Cindy Koehn to conduct Conflict Dynamics Training at the Facility (ALJD 19:5-6; Tr. pp. 194-196, 239). The training is designed to look at behavior to resolve conflicts, by focusing on both constructive and destructive behaviors (ALJD 19:9-11; Tr. pp. 431-434).

Koehn conducted the training in April 2008 (ALJD 19:8-9; Tr. p. 430). Nelson was off work that day, so she did not participate in the sessions (Tr. p. 431). Two sessions were conducted. During the first session, a nurse informed Koehn that one particular individual was dividing the Medical Department (Tr. pp. 240-241, 430-433). Koehn asked to whom the nurse was referring, but the nurse was afraid to reveal the person's name for fear of retaliation because the person had a close relationship with Health Services Administrator Johnson (ALJD 19:14-15; Tr. pp. 431-432). Other nurses in the meeting then voiced the same concern. Koehn explained that it was important to resolve conflicts (in fact, this was the purpose of the training session), but that dissention could not be resolved unless the Facility was able to address the issues with the person accused of causing the conflicts (ALJD 19:13-15; Tr. pp. 431-433). Koehn added that

if those present did not wish to publicly reveal the name of the person causing dissention, then, the attendees should write down the person's name (ALJD 19:15-20; Tr. pp. 431-433). At this point, Koehn handed out slips of paper to the attendees, each person wrote a name on their piece of paper, and the slips were turned into Koehn (ALJD 19:15-19; Tr. pp. 240-241, 359-360, 366-367, 386-387, 430-433).

During the second session of the Conflict Dynamics Training, Koehn advised the attendees that it had been brought to her attention that someone was creating conflict in the Medical Department. The attendees confirmed this and, as in the first session, Koehn asked them to write down the person's name on a slip of paper, which they did and turned into Koehn (ALJD 19:15-19; Tr. pp. 431-433.)

After the sessions were concluded, Koehn met with Warden Adams and they reviewed the sixteen slips of paper turned in by the employees at the two sessions. All but one identified Nelson as the employee causing problems in the Medical Department (ALJD 19:19-24; R. Ex. 33; Tr. pp. 195-196, 240-242, 430-433).

D. Nelson's Discipline

The Facility follows a chain-of-command with respect to supervision and discipline (Tr. pp. 243-244). In the Medical Department, the LPNs and RNs are supervised by a Clinical Nurse Supervisor, and the Health Services Administrator (here Gloria Johnson) is responsible for supervising the entire medical staff (Tr. pp. 243-244). An Assistant Warden is responsible for various departments, including the Medical Department (Tr. pp. 243-244). Due to personnel transfers, there were three different Assistant Wardens over the Medical Department during Nelson's tenure at the Tallahatchie Facility (Tr. pp. 243-244). Thus, for all practical purposes, during the relevant timeframe, the responsibility for the Medical Department rested solely with Health Services Administrator Johnson. Therefore, it was crucial that she perform her

supervisory duties and discipline employees (including Nelson) appropriately (*Id.*). Warden Adams, who spent six years in the U.S. Army, relied upon Johnson and other supervisors to follow the established chain-of-command and perform their responsibilities (Tr. pp. 230-231, 243-244). However, that did not occur with respect to Johnson and Nelson because of their close personal relationship (ALJD 20:24-27; Tr. pp. 244-245, 254-255, 287-289).

The Company does not have a progressive discipline policy (Tr. p. 291). As Nelson admitted, an employee can be immediately terminated, with no prior warnings or discipline (GC Ex. 30; Tr. pp. 104, 291). At times, the Company uses a form entitled "Problem Solving Notice" when issuing discipline to employees (GC Ex. 30; Tr. pp. 264-267), but the Notice covers various levels of discipline, ranging from a verbal counseling to termination (GC Ex. 30; Tr. pp. 264-266, 291) and it is not required to be used in all situations (Tr. p. 291).

In this case, Warden Adams received not only written complaints, but verbal complaints from various employees about Nelson's bullying tactics, the way in which she interacted with other employees, and her aggressive attitude (ALJD 16:16-20; Tr. pp. 237-238, 254-255). Accordingly, he met with Health Services Administrator Johnson to investigate why Johnson was not correcting Nelson's offensive behavior (ALJD 18:30-32; Tr. pp. 244-245). It became clear to Adams that Nelson and Johnson were extremely close, so that Johnson was "blind to what was going on in her department" (ALJD 18:43-45; Tr. pp. 244-245, 254-255).

Consequently, on numerous occasions, Warden Adams met with Nelson, discussed specific complaints, and warned her to immediately discontinue her disruptive behavior (ALJD 18:30-32; Tr. pp. 210, 238-239, 289-290, 294-295). During one meeting, Adams informed Nelson that two RNs had resigned because of her, and directed Nelson to change her behavior or be terminated, because "before I lose all of the nurses in the Medical Department . . . I will lose

[you]" (ALJD 18:32-33; Tr. pp. 238, 289). Adams instructed Nelson to stop belittling, disrespecting, and bullying her co-workers (ALJD 18:36-38; Tr. pp. 238-239). On another occasion, Warden Adams and Health Services Administrator Johnson together met with Nelson about Nelson's disruptive behavior (Tr. pp. 238-239). Despite Warden Adams' repeated warnings to Nelson, her misconduct continued (Tr. p. 239). As Warden Adams explained, Nelson was given "a thousand chances . . . more chances than anybody in that facility." (Tr. p. 254). His testimony in this regard is undisputed.

In addition to Warden Adams' verbal reprimands and counselings, in October 2007, Health Services Administrator Johnson counseled Nelson regarding co-worker complaints of her unprofessional behavior (R. Ex. 4; Tr. pp. 103-104). Moreover, on February 22, 2008, Nelson received a written notice from Johnson because she violated the Company's Code of Conduct (ALJD 9:12-44; GC Ex. 16; Tr. pp. 82-84). At the hearing, Nelson attempted to characterize this notice as not being discipline; but, to the contrary, it was issued only to Nelson, was issued in response to Nelson's February 22, 2008, verbal assaults upon Dr. Jerry Tankersley and Clinical Nurse Supervisor Albert Maples, and instructed Nelson that "[i]t is not acceptable for staff to engage in a shouting match," "[y]our behavior on the above date was not professional in nature and thus was a violation of Policy 3-3," and, "[i]n the future, it is important that you remember to think twice before speaking" (ALJD 9:26, 28-30; GC Ex. 16; Tr. p. 92).

E. The Code of Conduct

The Company has a Code of Conduct that governed Nelson's employment, which the ALJ completely failed to consider or analyze in his decision (R. Exs. 18-20; Tr. pp. 105-108, 205). Nelson agreed to "abide by the policies and standards contained and referred to in the Code of Conduct" and understood that "failure to do so may result in disciplinary action, up to and including termination . . ." (R. Exs. 9-11; Tr. pp. 104-106). The Code of Conduct

specifically requires that employees "help ensure a safe work environment that is free from unlawful discrimination and harassment, and characterized by respect and open communication" (R. Exs. 18-19, p. 6; Tr. pp. 106-107).

There is also a Facility Employee Supplement to the Code of Conduct, which also governed Nelson's employment with the Company (R. Ex. 20; Tr. pp. 107-108). The Supplement includes the Facility's Standards of Conduct, such as "Cooperation and Mutual Respect," which instructs employees to "support the efforts of other employees to carry out their duties and contribute to an atmosphere of mutual respect among employees and respect for employees by residents" and "Threats and Intimidation Toward Other Employees and Visitors," which prohibits employees from using "physical violence, threats or intimidation toward fellow employees or visitors to the facility" (R. Ex. 20, p. 1; Tr. pp 107-108).

At the hearing, Nelson admitted that the disruptive conduct in which she engaged violated the Code of Conduct, and was conduct for which she could be summarily terminated, including: lack of mutual respect for others; unprofessionalism; yelling or screaming at co-workers; refusing a dentist's request for medication; referring to a supervisor as stupid or incompetent; and, refusing a supervisor's work assignment (Tr. pp. 124-125). Nelson's admissions in this regard are undisputed; yet the ALJ completely failed to consider or analyze them in his Decision.

F. Nelson's Termination

Nelson's verbal attack on Clinical Nurse Supervisor Strong on July 29, 2008, which brought Strong to tears, was the proverbial straw that broke the camel's back (ALJD 20:24-27; Tr. pp. 254, 271). On July 30, 2008, Warden Adams, Managing Director Garner, and Vice President of Facility Operations Turner discussed Warden Adams' recommendation to terminate Nelson (ALJD 20:33-42; Tr. pp. 197-198, 214, 219-220, 254-255, 286). Adams described

numerous employee complaints about Nelson's argumentative, confrontational and disruptive behavior, and Nelson's refusal to correct her behavior (Tr. pp. 215-218, 221-224). They discussed the Receiver's mandate that the Medical Department immediately correct various deficiencies, and that Nelson's behavior was antithetical to that directive (Tr. pp. 197-198, 215-217, 220, 222-225, 251-253).

For instance, the Receiver mandated that a certain number of RNs be employed and, if the Facility fell short of that staffing level, it was in violation of the federal court orders, and risked contract termination (Tr. pp. 251-253). Because of Nelson, the Facility lost Clinical Nurse Supervisor Albert Maples in April 2008, and shortly thereafter, RN Deanna Hardin, in June 2008—both of whom informed Warden Adams that they quit because of Nelson (ALJD 19:26-27, 42-44; ALJD 19:46–20:4, 6-16; Tr. pp. 245-248). In addition, the Facility was in danger of losing two more RNs because of Nelson—RN Shakantayeri Scott, who Nelson physically assaulted on May 21, 2008, and Clinical Nurse Supervisor Strong, who Nelson verbally ridiculed and brought to tears on July 29, 2008 (R. Ex. 53, 54, 56, 57; Tr. pp. 235-236, 249, 311-313, 347-348, 352-353). In sum, Nelson's misconduct was extremely serious because it threatened the Company's contract with the California Department of Corrections and Rehabilitation and the continued viability of the Tallahatchie Facility (Tr. pp. 196-197, 251-253).[4]

Warden Adams recommended termination, and Managing Director Garner and Vice President Turner concurred (Tr. pp. 197-198, 255-256, 286). The termination meeting occurred on August 1, 2008, and was attended by Warden Adams, Assistant Warden Cano and Nelson (Tr. pp. 70, 256). Warden Adams advised Nelson that she had two choices, either resign or be terminated (Tr. p. 72). Nelson refused to resign, so Warden Adams terminated her employment

[4] The ALJ also failed to consider Warden Adams' undisputed testimony that Scott and Strong were on the verge of resigning because of Nelson's misconduct.

(GC Ex. 12; Tr. p. 73). Nelson admits that Warden Adams stated she was terminated because of a variety of complaints from a number of employees (R. Ex. 58; Tr. p. 151).[5]

Warden Adams did not show the numerous written complaints to Nelson, or review each specific instance of misconduct during her termination meeting (Tr. pp. 268-270, 276-279, 291-292). He testified, without contradiction, that it would be unethical to show such complaints to any employee and that he never does so (Tr. pp. 279, 291-292). In addition, Warden Adams explained his practice that, during termination meetings, he summarizes the reasons for termination and does not specifically review each factor leading to termination (Tr. pp. 292-293). As Warden Adams confirmed, "in Ms. Nelson's case, it was a whole bunch of issues. And during the last year and a half these issues ha[d] been addressed in one form or the other with Ms. Nelson. So it wasn't anything of a surprise to her" (Tr. p. 293).

After Nelson's termination, employees described the Medical Department as "peaceful" and "pleasant" (Tr. pp. 314, 253-254). The Receiver has complimented the Medical Department's ability to quickly work together to resolve deficiencies (Tr. p. 204) and Warden Adams received an outpouring of support from the medical staff that Nelson was finally gone (Tr. pp. 253-254).

G. The Company's Grievance Procedure and Nelson's Post-Termination Grievance

The Company has a three-step Grievance Procedure, and it encourages employees to file grievances (R. Ex. 30; Tr. pp. 198-199, 255-256). The Company does not discipline employees for utilizing the Grievance Procedure (Tr. pp. 198, 417). The policy expressly prohibits retaliation, and provides employees with various avenues for reporting any perceived retaliation (R. Ex. 30). Beyond the Grievance Procedure, the Company encourages employees to discuss

[5] The ALJ did not consider Nelson's admission in this regard in his decision.

working conditions, and strives to address any employee concerns (Tr. p. 199). For instance, the Company has an Ethics Compliance Line, through which employees can speak anonymously with an Ethics Compliance Officer (Tr. p. 199). Because the Company encourages employees to speak out, they raise wage and other issues with Warden Robert Adams, on an almost daily basis, and the Company does not discipline employees for doing so (Tr. pp. 199, 256).

Nelson utilized the Company's Grievance Policy and grieved her discharge. Specifically, on August 4, 2008, she forwarded a grievance to Chief Executive Officer John Ferguson who, in turn, assigned it to Vice President of Facility Operations Turner for investigation (ALJD 12:40-41; GC Ex. 13; Tr. pp. 76, 200-201). Turner spoke with Nelson on August 14, 2008, to collect information (ALJD 13:8-17; Tr. pp. 77-78, 200-201). During the call, Nelson provided Turner with a list of individuals to interview as part of the investigation (ALJD 13:17; Tr. pp. 77-78, 201). Turner asked Keenan Davis, the Human Resources Manager at the Company's Delta Correctional Facility, to interview the individuals named by Nelson, because Davis did not work at the Tallahatchie Facility, did not know the individuals involved, was unfamiliar with the various claims, and, thus, would provide an unbiased perspective to the investigation (Tr. pp. 201-202, 393-394). Davis conducted the interviews, and provided Turner with a report summarizing his investigation (R. Ex. 24; Tr. pp. 202-203, 393-394).

Davis' report indicates that, on various dates in August and September 2008, he interviewed eight individuals, all of whose names were provided by Nelson: Keisha Thomas, LaShunda Henderson, Tammy Taylor, Jamecia Calvin, Ms. Stanton, Dr. Schaffer, Diane Jones and LeDonna Isabella (R. Ex. 24). Although one would have expected these people to be supportive of Nelson, because she identified them as witnesses, instead, they validated the Company's reason for terminating Nelson—her disruptive behavior (R. Ex 24). Comments were

made by these witnesses, such as: (1) Nelson "would always talk down to" RNs; (2) she "constantly complained about others"; (3) Nelson "was very demeaning of others": (4) "[t]here were always complaints [about Nelson] from medical and non-medical staff"; (5) "[n]ew hires in pre-service would often complain [about her]"; (6) "[t]he Medical Department was tense when she was here"; (7) "[s]he was successful at staff splitting (making people go against each other)"; (8) Nelson "[d]id not promote comradeship"; (9) "[s]he made a lot of people angry with her style of confronting them"; (10) Nelson "[w]as rude to visitors"; (11) she "[w]as not a promoter of helping others"; (12) Nelson was "[v]ery loud, in-your-face type"; (13) Nelson was "[e]stranged when it came to her co-workers"; and (14) "[i]f she feels that she can intimidate you, she will use it to her advantage" (R. Ex. 24). Davis' investigation concluded that Nelson was disruptive within the Medical Department, and had multiple escalating issues (Tr. p. 204). The ALJ however, failed to consider this undisputed testimony that the Company conducted an independent investigation into the basis for Nelson's discharge, which confirmed that her behavior was unacceptable and warranted discharge.

On October 30, 2008, Turner notified Nelson that her grievance was denied, and provided Nelson with a detailed explanation for why he denied her grievance (ALJD 13:29–14:11; GC Ex. 15; Tr. pp. 80-81).

III. ARGUMENT

As a threshold jurisdictional issue, the two-Member Board does not have the statutory authority to issue a final Decision and Order resolving the Respondent's exceptions to the ALJ's Decision and Recommended Order. Notwithstanding the two-Member Board's lack of jurisdiction, the Board should set aside the ALJ's Decision on two independent grounds: (1) the General Counsel failed to establish a *prima facie* case of discrimination; and (2) the Company established, with overwhelming and undisputed evidence, that it would have discharged Nelson

even in the absence of her concerted activity. For these reasons, the ALJ's Decision should be reversed, and the Board should dismiss the Complaint in its entirety.

A. The Two-Member Board Lacks Jurisdiction to Issue a Final Decision and Order in This Case

Section 3 of the National Labor Relations Act ("the Act") creates the National Labor Relations Board ("the Board"). As amended by the Labor Management Relations Act, the Board consists of five members, "appointed by the President by and with the advice and consent of the Senate." Section 3(a) of the Act, 29 U.S.C. § 153(a). "The Board is authorized to delegate to *any **group** of three or more **members*** any or all of the powers which it may itself exercise." Section 3(b) of the Act, 29 U.S.C. § 153(b) (emphasis added). The Act provides that

> [a] vacancy in the Board shall not impair the right of the remaining *members* to exercise all of the powers of the Board, and three ***members*** of the Board shall, at all times, constitute a quorum of the Board, except that two ***members*** shall constitute a quorum of *any **group** designated pursuant to the first sentence* hereof.

Id. (emphasis added). The statutory intent is clear from a straightforward reading of its language. The Board consists of five *members*. A quorum, which is necessary for the Board to act, requires at least three *members*. The Board can delegate its powers to "groups" of "three or more *members*." Two *members* of such "groups" of three or more *members* constitute a quorum of such groups for the transaction of business. The Board's regulations reflect this obvious legislative intent.[6]

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[6] "The term "Board" shall mean the National Labor Relations Board and shall include any *group* of three or more ***members*** designated pursuant to Section 3(b) of the Act." 29 C.F.R. § 102.2 (emphasis added).

> For purposes of this subpart, "meeting" shall mean the deliberations of at least three ***members*** of the *full Board,* or the deliberations of at least two ***members** of any group of three Board **members*** to whom the Board has delegated powers which it may itself exercise, where such deliberations determine or result in the joint conduct or disposition of official Agency business, but does not include deliberations to determine whether a meeting should be closed to public observation in accordance with the provisions of this subpart.

29 C.F.R. § 102.138 (emphasis added).

According to the Board's December 28, 2007 press release, Chairman Battista's term expired December 16, 2007. The terms of Members Kirsanow and Walsh, who were serving under recess appointments, expired when the 110th Congress adjourned on December 31, 2008. Pursuant to the March 4, 2003 Office of Legal Counsel ("OLC") Memorandum, on December 20, 2008, the then four-Member Board delegated all of its powers to three of its then-sitting members, indefinitely, despite knowing that two of those four Members' recess appointments would expire in a matter of days upon the adjournment of the 110th Congress. Ignoring the fact that this "group" would shortly consist of only two Members, the Board attempted to avoid the requirements of the statute by making this delegation before the recess appointments of Members Kirsanow and Walsh expired. While sanctioned by the OLC Memorandum Opinion, this action is not supported by the Act or the Board's rules and regulations, basic principles of organizational governance, or the scant authorities referenced in the OLC Memorandum.

The statutory and regulatory intent are largely self-evident from their language. A quorum of *the Board* may delegate its powers to "groups" of three or more *members*. While "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers *of the Board*", Section 3(b) of the Act, the Act says nothing about vacancies in the "groups" to which Board functions may be delegated. And while one or more vacancies may not impair the authority of the Board as a whole to perform its functions, even this proviso is subject to the limitation that the Board itself must have a quorum of three or more members to act. Where, as here, vacancies reduce the Board to less than a quorum, it is in fact "impaired" from further action by the statutory quorum requirement.

Clearly, there is no similar proviso allowing a reduced group of three *members* to act where the Board itself has only two active members. All of the statutory and regulatory

provisions clearly contemplate that the "groups" shall be composed of three *members*, as an irreducible minimum. While the Board may act with four members, or even three, a three member quorum of the Board cannot delegate its authority to a two member "group" composed of two active members and one former member.

The Board's December 20, 2007 attempt to keep itself "alive" defies basic principles of organizational governance. As explained by Judge Wald regarding a similar situation involving the National Mediation Board, "[w]hen a quorum of the Board by order makes a delegation, that delegation ceases to exist when the quorum no longer exists, *see, Fletcher Cyclopedia Corporations* § 421, at 2709-71 (perm. Ed. 1982)." *Railroad Yardmasters of America vs. Harris*, 721 F.2d 1332 (D.C. Cir. 1983) (Wald, J. dissenting).[7] Once the Board fell below a quorum, all of its delegations expired along with its own power to act. A contrary result, as a moment's reflection shows, is absurd: it would allow an expiring Board to completely evade the Act's clear quorum requirement, and empower two members to act as such a quorum in perpetuity.

The "authorities" cited in the OLC Memorandum do nothing to alter this basic organizational principle, and indeed the OLC does not appear to have considered it or the statutory and regulatory language cited above. *Photo-Sonics, Inc. vs. NLRB*, 678 F.2d 121 (9th Cir. 1982), enfg. 254 NLRB 567 (1981), cited in the OLC Memorandum, is clearly distinguishable. There, it was clear, a three-Member panel of the Board *had* considered the case at issue: fortuitously, however, the decision was announced on the same day as then-Member Penello's resignation *became effective*. It was obvious, however, that Member Penello had in fact fully participated in the deliberation and consideration of the decision. And while the 9th

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[7] Judge Wald also cited authorities explaining that "the death of the principal or loss of capacity to act terminates the authority of the agent without notice to him," Restatement (Second) of Agency §§ 120, 122 (1957), and that "delegated authority ceases upon the resignation of the officer who delegated such authority." Fletcher, *supra*, § 504, at 514.

Circuit opined that "[e]ven if this court accepted Petitioner's arguments that Penello did not participate in the Board's decision, the decision would nonetheless be valid because a 'quorum' of two panel Members supported the decision," *Id.* at 123, this speculative dicta does not support the December 20, 2007 Board's action. For at the time the three Member "group" of which Member Penello was a Member acted, there *were* three *Members*, and there *was* a quorum of the full Board. The 9th Circuit was hardly considering, and cannot be said to have sanctioned, a situation where the third Member of the panel to which a matter was referred had long-since resigned, or where the Board quorum that had delegated authority to the panel had ceased to exist. The other cases incidentally referenced in the OLC Memorandum, dealing with other and differently-worded statutes (the Railway Labor Act provisions creating the National Mediation Board, in *Yardmasters*, *supra*), or with the practice of federal courts operating under different statutes and court rules, *Tobin vs. Ramey*, 206 F.2d 505 (5th Cir. 1953), are no more persuasive.

For these reasons, the two-Member Board is without jurisdiction to issue a final decision resolving the Company's Exceptions to the Administrative Law Judge's Decision and Recommended Order. Accordingly, the Company requests that the Board defer ruling on the Company's exceptions until a three-Member quorum is re-established.

B. The General Counsel Failed to Establish a *Prima Facie* Case of Unlawful Discrimination

The ALJ erroneously concluded that the General Counsel established a *prima facie* case of discrimination (ALJD 24:15-16). This conclusion cannot withstand scrutiny because: (1) there is no record evidence the Company's decision-makers knew about Nelson's concerted activities when they made their decision to discharge Nelson; (2) there is no evidence that the Company's decision-makers bore any animus whatsoever toward Nelson's concerted activities; and (3) a close analysis of the factors relied on by the ALJ fail to establish a casual nexus

between Nelson's concerted activity and her discharge. Each of these errors is fatal to the ALJ's conclusion that Nelson's discharge was unlawfully motivated. Accordingly, that conclusion should be reversed.

1. There is no evidence that the Company's decision-makers knew of the concerted nature of Nelson's activity

One of the essential elements of the General Counsel's *prima facie* case of discrimination on the basis of an employee's protected concerted activity is a showing that the employer ***knew of the concerted nature of the employee's activity***. *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub. nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *Meyers Industries*, 281 NLRB 882 (1986) (*Myers II*) affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The ALJ concluded that the Company knew that the following conduct by Nelson was concerted activity: (a) Nelson's February 26, 2008 grievance against Clinical Nurse Supervisor Maples (ALJD 22:19-20; 23:24-25); (b) Nelson's May 2008 letter to Tigue (ALJD 23:32-33); and (c) Nelson's July 30 conversations with Company officials regarding bonuses for nurses (ALJD 23:35-37). Although the Company does not contest the ALJ's finding that these activities were concerted, it his conclusion that the Company's decision-makers were aware of the concerted nature of Nelson's actions (ALJD 24:12-13) finds no support in the record. For these reasons, as discussed below, the ALJ's findings in this regard are inconsistent with the record and his conclusion that the General Counsel established the "knowledge" element of his *prima facie* case must be reversed.

a. <u>The Company viewed Nelson's grievance against Maples as a complaint on her behalf only</u>

As to Nelson's February 26, 2008 grievance against Clinical Nurse Supervisor Maples, Warden Adams, who was initially responsible for investigating Nelson's grievance, considered that grievance as Nelson's own personal grievance, and not as filed on behalf of other employees

(GC Ex. 2, 5; Tr. pp. 281-282). In addition, Nelson's conduct and statements during the grievance meetings gave no indication that she filed the grievance on behalf of anyone, other than herself (GC Ex. 4; Tr. pp. 37-50). The other three LPNs who attached their own grievances to Nelson's did not participate in any of the subsequent discussions between the Company and Nelson concerning her grievance against Maples, nor were any employees' concerns, other than Nelson's, discussed during the meetings (Tr. pp. 40-46). Thus, the ALJ's finding that the Company's decision-makers knew of the concerted nature of Nelson's grievance against Maples is not supported by the record and must be reversed.

b. <u>There is no evidence that Nelson's May 2008 letter was actually received by Tigue or that the Company's decision-makers were aware of Nelson's letter</u>

Nelson allegedly sent a letter regarding pay rates for nurses at the Facility to Vice President of Health Services John Tigue via certified mail (GC Ex. 10; Tr. pp. 54-56). However, the only indication that the letter was delivered to, or received by, the Company is a certified mail receipt signed by a "Jason Dameron" (GC Ex. 10; Tr. p. 55). The General Counsel, however, completely failed to establish (1) Dameron's identity as a Company representative, (2) that Vice President Tigue actually received the letter, or (3) even if Tigue received it (which he did not), that he was involved in the decision to discharge Nelson. Additionally, there is no evidence whatsoever that the Company's decision-makers, Warden Adams, Managing Director Garner, and Vice President of Facility Operations Turner, had any knowledge of this letter, let alone Nelson's claimed involvement in preparing and sending it. Thus, the General Counsel wholly failed to establish the Company's decision-makers' knowledge of Nelson's involvement in the letter allegedly sent to Tigue. Despite this lack of evidence, the ALJ found that the Company was aware of Nelson's efforts regarding the letter (ALJD 23:32-33). The ALJ's finding in this regard is not supported by the record and must be reversed.

c. Nelson's July 30 meeting with Company officials regarding bonuses did not indicate to those officials that Nelson was acting on behalf of others

With respect to the LPN meetings with Recruiting Specialist Carter, Human Resources Manager Holly, and Senior Human Resources Director Koehn, there is no evidence that Carter, Holly, or Koehn perceived Nelson as the spokesperson for the LPNs. This is supported by the testimony of LPNs Henderson and Thomas, who testified that each of them were inquiring into whether they, **personally**, were getting bonuses, and that Nelson was not designated or acting as the group's spokesperson (Tr. pp. 68-69, 159-160, 174, 468). Instead, each of them "went up there on our own" (Tr. pp. 174-175). The fact that Nelson was acting solely in her own personal, as opposed to a group, interest in these bonus discussions is further established in her post-discharge Grievance to Chief Executive Officer Ferguson, wherein Nelson claimed that she "only wanted to know why **I** wasn't receiving the bonus, when others got it" (GC Ex. 13, p. 3; Tr. pp. 126-127) (emphasis added). Thus, it is difficult to comprehend how the Company could know that Nelson was engaged in concerted activity, when the participants (including Nelson) indicated that they were not engaged in concerted activity. Even assuming that these Company officials did perceive Nelson's activity as concerted, there is absolutely no evidence these officials were involved in the decision to terminate Nelson or that the Company's decision-makers were aware of the details of this meeting.

This is the fatal flaw in the ALJ's finding that the Company knew of Nelson's concerted activity—the absence of any evidence in the record that the decision-makers, Warden Adams, Managing Director Garner, and Vice President Turner, had any knowledge of the concerted nature of these activities. In sum, the evidence simply does not support the ALJ's finding that the Company's decision-makers knew of the concerted nature of any of Nelson's activity, and that finding must be reversed.

2. There is no evidence of any Company animus toward Nelson's concerted activity

Because discharge cases nearly always turn on the question of employer motivation, the analysis in so-called mixed motive cases is governed by the familiar burden-shifting framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). An essential element of the General Counsel's *Wright Line* case is the Company's animus for the employee's protected activity. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002); *Tracker Marine*, 337 NLRB 644, 646 (2002); see also *Krist Oil Co.*, 328 NLRB 825, 840 (1999); *Gatliff Coal Co.*, 301 NLRB 793, 798 (1991), enfd. 953 F.2d 247 (6th Cir. 1992). As discussed below, however, the ALJ here completely failed to consider evidence demonstrating that the Company bore no animus toward Nelson's concerted activities.

As set forth in detail above, there is no evidence whatsoever that the individuals involved in the decision to terminate Nelson—Warden Adams, Managing Director Garner and Vice President Turner—had any knowledge of the concerted nature of Nelson's activity, or perceived that her activity was concerted in nature. As a matter of simple logic, then, the Company's decision-makers could not have been motivated to terminate Nelson because of their animus, if any, toward that activity because they were not aware of it.

Additionally, as a factual matter, there is absolutely no evidence in the record demonstrating that the Company bore animus toward Nelson's concerted activities. In fact, the evidence proves precisely the opposite. For instance, LPNs D. Thomas, Henderson and P. Thomas raised issues about the bonus and received the bonus (Tr. pp. 160, 172-173, 175). Fifteen LPNs signed the May 2008 letter, and there is no evidence that any of them have been threatened, disciplined or terminated as a result. To the contrary, LPNs Henderson, D. Thomas, P. Thomas, Williams and Watson all signed the letter, and remain employed by the Company

(GC Ex. 9). Thus, the undisputed evidence shows that other employees who complained about pay and bonuses were not disciplined or terminated as a result. The ALJ completely failed to consider this undisputed evidence. Had he done so, the conclusion is inescapable that the Company bore absolutely no animus toward Nelson's, or any employee's, concerted activities.

Turning to the ALJ's finding that the Company terminated Nelson in response to her grievances, the evidence shows that the Company voluntarily provides its employees with a three-step grievance procedure and encourages them to file grievances. It defies logic to conclude that a company that provides employees with a grievance program and encourages them to use it, would discipline or terminate employees for doing so. In fact, Warden Adams confirmed that he receives specific training to encourage employees' use of the grievance procedure, and considers the process a valuable employee relations resource (Tr. pp. 255-256). In addition, Nelson filed grievances on October 29, 2007, and February 26, 2008, but her discharge did not occur until August 1, 2008—over eleven months and five months later, respectively (GC Ex. 2, 13; R. Ex. 4). This significant gap in time between Nelson's concerted activity and her discharge dispels the notion that there was a connection between the two and, thus, any inference of animus. *Qualitex, Inc.*, 237 NLRB 1341, 1344 (1978) (no showing that anti-union animus tainted the discharge of an active union supporter over four months after an election). Moreover, since January 1, 2007, other employees have filed grievances, including Kimly Coleman, who filed as many grievances as Nelson (three), and there is no evidence that Coleman or any of the other employees have been threatened, disciplined or terminated as a result (Tr. pp. 440-442). In sum, there is absolutely no evidence of the Company's animus for Nelson's concerted activities.

3. The General Counsel failed to show a causal nexus between Nelson's concerted activity and her discharge

The final essential element in the *Wright Line* analysis requires the General Counsel to establish a causal nexus or link between the employee's protected activity and the discharge. *American Gardens Management Co.*, supra at 645; *Tracker Marine*, supra at 646. As discussed above, the Company's decision-makers (1) did not know of the concerted nature of Nelson's activity when they made the decision to discharge Nelson and (2) bore no animus toward Nelson's concerted activity. This case demonstrates why the Board requires the General Counsel to establish a causal nexus. Here, although some of the Company's supervisors were aware that Nelson was engaged in certain activities that the ALJ found were concerted, none of the Company's supervisors nor any of the Company's decision-makers were aware of the concerted nature of Nelson's actions when she engaged in those activities. Simply because some supervisors were aware of Nelson's actions (but were not aware those actions were concerted) does not necessarily mean that other supervisors, who were not aware of Nelson's activities or the concerted nature of those activities, decided to discharge Nelson on that basis.

Rather than requiring the General Counsel to prove causation (as required by *American Gardens Management Co.*, supra at 645; *Tracker Marine*, supra at 646), the ALJ based his finding that Nelson's discharge was unlawfully motivated on an analysis of six different factors: (1) the "talking points" Adams used during his discharge meeting with Nelson; (2) Adams' statement to Nelson during the discharge meeting that Nelson's attitude did not fit the environment the Company sought to establish and maintain; (3) Koehn's March 2008 statement that the Company got rid of "troublemakers"; (4) Nelson's quadruple hearsay statement regarding a statement by Koehn that Nelson was "negative" and "incited the nurses"; (5) the timing of Nelson's discharge in relation to her inquiry with Koehn about the nurses' bonuses and

the status of Nelson's earlier letter to Tigue about nurses' bonuses; and (6) Nelson's post-discharge written job recommendation prepared by Johnson. A close examination of these factors, however, reveals that none supports the ALJ's inference of unlawful motivation. Accordingly, the General Counsel failed to demonstrate a causal nexus between Nelson's concerted activities and her discharge.

a. The "talking points" document

The ALJ found that Warden Adams' "talking points" for his exit interview with Nelson "standing alone, constitute unlawful motivation for her discharge" (ALJD 24:18-24). Although the ALJ does not state in his decision what was included in Warden Adams' talking points, the document is part of the record (R. Ex. 58; Tr. pp. 257-258). In his talking points for the exit interview, Warden Adams mentioned that Nelson had "repeatedly demonstrated that [Nelson] did not have trust and respect" for her co-workers and supervisors; that the Company "had taken and treated [her] concerns seriously and with the same respect and sense of urgency that we treat any employee concern"; that Nelson was "never satisfied with any response to [her] concerns and [Nelson] never acknowledge that [her] own behavior has contributed to or created difficult situations for [Nelson] and other who work with [Nelson]"; that Nelson "blame[d] everyone else and seem[ed] to look for reasons to complain about others" (R. Ex. 58). Taking the full context of Warden Adams' statements into consideration, the ALJ's discussion of the talking points fails to paint a complete picture of what Warden Adams told Nelson, which was that Nelson's own misconduct and her difficulty in getting along with co-workers and supervisors was the reason for her discharge.

Additionally, the ALJ's finding in this regard ignores the absence of evidence that Warden Adams knew of the concerted nature of Nelson's actions when he conducted the exit interview. For this reason, there is no evidence that Adams' comments were reference to the

concerted nature of Nelson's activities. By inferring, from isolated statements taken out of context, that an individual who had no knowledge that Nelson had engaged in concerted activities somehow could base a decision to discharge Nelson on the basis of her concerted activities defies basic logic. The Board should reject the ALJ's finding because it is against the weight of the evidence and is based on an erroneous view of Board law, which, as discussed in detail above, clearly and plainly requires the General Counsel to show knowledge of the concerted nature of an employee's activity before an inference of unlawful motivation can be drawn. *Meyers II*, supra.

b. Adams' statement about Nelson's attitude

The ALJ found that Adams' reference to Nelson's attitude during his exit interview with Nelson indicated that her "attitude of pursuing employee issues, concerns, and complaints vigorously" was a factor in her discharge (ALJD 24:25-28). A close examination of the ALJ's decision where Adams' view of Nelson's "attitude" was discussed makes clear, however, that the "attitude" Adams was referring to was Nelson's belligerent and bullying attitude toward her co-workers and supervisors (ALJD 14:5-10; 18:36-38; 19:1-4; 19:25-26). The testimony concerning Nelson's "attitude" also refers to her belittling, bullying, and disrespectful attitude toward her co-workers and supervisors (Tr. pp. 238-239, 270, 289). Thus, although the ALJ inferred that Adams' statement during the exit interview concerning Nelson's "attitude" referred to Nelson's attitude of engaging in concerted activity, that inference has no support in the record and must be rejected.

c. Koehn's statement about "troublemakers"

The ALJ found that Senior Director of Human Resources Koehn's statement in March, 2008 (some five months prior to Nelson's discharge) that Nelson was a "troublemaker" and that the Company gets rid of "troublemakers" is indicative of the Company's unlawful motivation for

Nelson's discharge in August, 2008. Nelson testified that she told Koehn and Warden Adams during a March 14 meeting regarding Nelson's grievance against Maples that Nelson felt as though Maples was "trying to make it seem like I caused all the trouble," that Nelson "had been trying to help [her] co-workers because [she] knew all the policies," that Nelson "don't want one of [her] co-workers to get in an trouble," but that "[Nelson's] co-workers and Mr. Maples try to make it seem like [Nelson was] a troublemaker" (Tr. pp. 43-44). In response, Nelson testified that Koehn said the Company "eventually get[s] rid of troublemakers" (Tr. pp. 44). The ALJ failed to consider this conversation in context (ALJD 6:32-35). Had the ALJ done so, it is clear that Koehn's comment about "troublemakers" had nothing to do with Nelson's grievance (or Nelson's other concerted activities) but instead was a statement that employees who "got into trouble," as Nelson put it, eventually were discharged or asked to resign. Additionally, the evidence is undisputed that Koehn was not a decision-maker regarding Nelson's discharge. Thus, her statement is not probative of the Company's decision-makers' motivation for discharging Nelson.[8]

As to the timing of Koehn's statement, numerous intervening events took place between her statement and Nelson's discharge:

- An inmate died at the Facility in April 2008, resulting in an investigation by the California Department of Corrections and Rehabilitation (ALJD 15:38-41; Tr. pp. 186-

[8] The ALJ credited Nelson's testimony concerning Koehn's "troublemaker" comment. In crediting Nelson, however, the ALJ failed to consider other credited testimony that detracts from the significant weight the ALJ gave to Nelson's recollection of the March 14 meeting. The Board has historically given less deference to demeanor-based credibility findings, such as the ALJ's crediting of Nelson's testimony concerning Koehn's statement, where the judge ignores or gives insufficient weight to other evidence that belies the credited testimony. See, e.g., *Engineered Products Co., LLC*, 351 NLRB 767 10 (2007); *Braclo Metals, Inc.*, 227 NLRB 973 fn. 4 (1977). Here, Nelson testified that she knew Koehn from Koehn's Conflicts Dynamic Training sessions with employees (Tr. p. 43). However, Koehn testified that the training took place in April 2008, and that Nelson did not attend any of the training sessions because it was her day off (Tr. pp. 430-431). For this reason, the ALJ erred by giving Nelson's testimony such critical importance in his finding of unlawful motivation when her testimony is directly contradicted by other credited testimony.

187). That investigation revealed numerous deficiencies that the Facility was ordered to correct at the risk of losing its contract (ALJD 15:46–16:2; Tr. pp. 189, 193, 252, 304-305). One of these deficiencies was the level of RN staffing in the Medical Department. Thus, the Facility needed to recruit new RNs and retain those it already had (ALJD 16:8-14; Tr. p. 192).

- On April 23, 2008, Clinical Nurse Supervisor Maples resigned, attributing his decision to resign to Nelson's misconduct (ALJD 19:26-44; Tr. pp. 245-248, 327-328).
- On May 21, 2008, RN Scott and Nelson were involved in an altercation, where Nelson physically assaulted Scott (ALJD 17:31-49; R. Exs. 53 & 54; Tr. pp. 235-236, 347-348, 352-353).
- On June 18, 2008, RN Hardin resigned, attributing her decision to resign to Nelson's misconduct (ALJD 19:46–20:4; Tr. pp. 248, 276, 400).
- On July 1, 2008, Human Resources Manager Holly complained that Nelson acted unprofessionally and called Holly a liar during a meeting concerning pre-employment health screenings (ALJD 17:43 – 18:5; R. Ex. 55; Tr. p. 236).
- On July 30, 2008, Nelson verbally berated Clinical Nurse Supervisor Strong (ALJD 18:7-20; R. Ex. 56; Tr. pp. 311-313).

The ALJ failed to consider whether these subsequent, intervening events detract from the probative value of Koehn's statement as indicative of the reason for Nelson's discharge. As Warden Adams testified, "[Nelson's behavior] was putting us in a position where we could lose our contract" with the California Department of Corrections and Rehabilitation (Tr. p. 255), which as Vice President Turner testified, would have been "devastating" to the Company and the Facility and its employees (Tr. p. 192). When viewed in context and in light of these intervening

events, the ALJ's reliance on Koehn's statement to support his finding of unlawful motivation is ridiculous and should be rejected.

d. Nelson's quadruple hearsay testimony

The Company recognizes that the Federal Rules of Evidence do not strictly apply to Board proceedings. *International Business Systems*, 258 NLRB 181, 181 fn. 5 (1981), enfd. mem. 659 F.2d 1069 (3rd Cir. 1983). For example, the Board has held that hearsay evidence *can be* admissible: (1) "if rationally probative in force"; **and** (2) "if corroborated by something more than the slightest amount of other evidence." *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980); see also *Kamtech, Inc.*, 333 NLRB 242 fn. 4 (2001) (rejecting argument that judge erred by relying on "double hearsay" because the witness who testified as to the first hearsay statement was impartial and the second hearsay statement was an admission by a party opponent). The Board has recognized, however, that at some point hearsay testimony *loses its probative value* and should not be considered. For example, in *Auto Workers Local 651 (General Motors)*, 331 NLRB 479, 481 (2000), the Board held that an employee's uncorroborated testimony that a second employee told her that he heard a supervisor called her a "voodoo sister" was unreliable hearsay, and that it did not support a finding that the supervisor was in fact hostile to her. See also *T.L.C. St. Petersburg*, 307 NLRB 605 (1992), affd. mem. 985 F.2d 579 (11th Cir. 1993) (finding that the judge properly accorded no weight to twice-removed hearsay).

In the instant case Nelson, clearly not an impartial witness, testified as follows:

> Gloria Johnson told me, "I told you that Cindy Koehn has something to do with it. I spoke with Warden Adams. He told me that Cindy Koehn said that you had called her being negative a few times and that you incited the nurses" (Tr. pp. 74-75).

This is quadruple hearsay (i.e., hearsay within hearsay within hearsay within hearsay) that is not corroborated by any evidence in the record. In fact, Warden Adams testified to the contrary—

that he did not consult, nor otherwise have conversations with, Koehn about Nelson's termination (Tr. p. 287). And, even having the opportunity to cross-examine Koehn, the General Counsel failed to question her about the allegations raised in Nelson's hearsay testimony (Tr. pp. 433-437). *Fisher Broadcasting, Inc.*, 324 NLRB 256 (1997) (judge refused to credit hearsay testimony and noted that General Counsel had the opportunity to cross-examine alleged declarant about the hearsay statement, but failed to do so).

Despite the absence of even a scintilla of evidence supporting Nelson's quadruple hearsay testimony, the ALJ nonetheless accepted as true, and specifically relied upon, the statements purportedly made by Koehn, that Nelson had "incited the nurses" and that Nelson was "being negative," in finding that Nelson's discharge was unlawfully motivated (ALJD 24:42-44). Additionally, the ALJ improperly grafted his view of the situation onto this quadruple hearsay statement by finding that Koehn was somehow referring to Nelson being negative "concerning pay and working conditions"—even though no evidence supported such an interpretation of Koehn's alleged statements (ALJD 24:42-44). As shown from the record excerpt quoted above, this was not what Nelson said in her testimony (Tr. pp. 74-75). In sum, Nelson's testimony was not corroborated by any other evidence in the record, and the ALJ's interpretation of Koehn's alleged statement is not even supported by Nelson's own testimony. Thus, the Board's standard for the admission of hearsay (i.e., if the hearsay is corroborated by something more than the slightest amount of other evidence) has not been satisfied by Nelson's quadruple hearsay testimony, and the ALJ erred by relying on it in his decision.

e. <u>The timing of Nelson's discharge</u>

The ALJ inferred unlawful motivation based on the timing of Nelson's August 1 discharge in relation to her July 30 inquiry with Koehn regarding the status of Nelson's letter to Tigue regarding bonuses for LPNs. The ALJ found the timing of Nelson's discharge "suspect,"

which indicated unlawful motive. As discussed below, the only suspiciously timed actions present here were *Nelson's* because just the day before her conversation with Koehn, she engaged in obvious and undisputed misconduct that warranted discharge and the Company's decision-makers were in the process of making the decision to discharge Nelson when she spoke with Koehn.

This is not a case where, on a dubious basis, the employer precipitously discharges an employee immediately after learning of that employee's protected activity. See, e.g., *Brookshire Grocery*, 282 NLRB 1273 (1987), enf. denied 837 F.2d 1336 (5th Cir. 1988) (hasty and unfounded discharge after cursory investigation supports inference of unlawful motive). Rather, unlike those cases, the timing of Nelson's discharge was dictated her own misconduct.

As discussed above, on July 29, 2008, when Clinical Nurse Supervisor Strong asked the nurses about an inmate who had complained of chest pains, Nelson berated Strong in front of Strong's subordinates, called Strong nosey, and stated that Strong had no business asking about the inmate's medical condition. As Warden Adams testified, following this incident he decided that "enough was enough" and that the Company had to take some action regarding Nelson's misconduct (Tr. pp. 254, 271). On July 30, 2008, Warden Adams, Managing Director Garner, and Vice President Turner discussed Warden Adams' recommendation to discharge Nelson (Tr. pp. 197-198, 214, 219-220, 254-255, 286). During that discussion, Warden Adams described numerous employee complaints about Nelson's argumentative, confrontational and disruptive behavior, and Nelson's refusal to correct her behavior (Tr. pp. 215-218, 221-224). They discussed the Receiver's mandate that the Medical Department immediately correct various deficiencies, and that Nelson's behavior was antithetical to that directive (Tr. pp. 197-198, 215-217, 220, 222-225, 251-253). It was during this discussion that the Company decided to

discharge Nelson. Importantly, however, there is no evidence, as discussed at length above, that Adams, Garner, or Turner were aware that Nelson spoke with Koehn on that same day regarding bonuses.

As the Board reasoned in *Frierson Building Supply Co.*, 328 NLRB 1023, 1024 (1999), where timing was the only factor suggesting unlawful motivation, the facts here show nothing more than that the timing of Nelson's discharge raises a *suspicion* of unlawful motive. However, "'mere suspicion cannot substitute for proof' of unlawful motivation." *Id.* (quoting *Lasell Junior College*, 230 NLRB 1076 fn. 1 (1977)); see also *Neptco, Inc.*, 346 NLRB 18, 20 (2005) ("mere coincidence is not sufficient evidence of [union] animus") (citation omitted). The record clearly shows that Nelson was manipulating the Company by engaging in concerted activity the day after her altercation with Strong in order to insulate herself from legitimate, non-discriminatory discipline for that inappropriate behavior. In these circumstances, the timing of Nelson's discharge is insufficient to support an inference that it was for discriminatory reasons, particularly when all the other factors typically relied on by the Board to infer unlawful motivation are absent. *Frierson Building Supply Co.*, supra at 1024.

f. Johnson's recommendation for Nelson

The ALJ found that Health Services Administrator Johnson's glowing job recommendation for Nelson is indicative of an unlawful motive for Nelson's discharge (ALJD 25:1-5). Once again, however, the ALJ's finding in this regard is flawed in two respects: (1) he failed to acknowledge that Johnson and Nelson were close friends; and (2) he failed to acknowledge that Johnson's opinions of Nelson were not considered by the Company during the decision-makers' deliberations over whether to discharge Nelson. The record clearly shows that Johnson and Nelson were close friends. Warden Adams knew this (Tr. pp. 245, 254) and Nelson's co-workers knew it also (Tr. pp. 431-432). In fact, when Warden Adams discovered

that Johnson had failed to adequately supervise Nelson because of Johnson's friendship with Nelson, he issued Johnson a verbal counseling regarding her interaction with Nelson (Tr. p. 288). In light of the "closeness" between Johnson and Nelson it is not surprising that Johnson provided a glowing recommendation for Nelson following her discharge. Additionally, the ALJ improperly attributes Johnson's view of Nelson's job performance (as reflected in the recommendation letter) to the Company decision-makers' view of Nelson's conduct. It is clear that Johnson played no role whatsoever in the Company's decision to discharge Nelson; accordingly, the ALJ erred by imputing Johnson's view of Nelson to the Company's decision-makers, who clearly held a different view of Nelson than did Johnson.

C. The Company Would Have Discharged Nelson Even In The Absence Of Her Concerted Activity

To satisfy its rebuttal burden under *Wright Line*, the Company need only prove that it had a reasonable belief that Nelson engaged in misconduct, and that it acted on that belief in discharging her. In analyzing the Company's rebuttal case, however, the ALJ's decision discusses only those facts which, according to the ALJ, indicate that the Company's reason for Nelson's discharge was pretextual. By doing so, the ALJ ignored undisputed evidence, including Nelson's own testimony, that Nelson's violations of the Company's Code of Conduct warranted discharge and that the absence of evidence of disparate treatment actually demonstrates a lack of unlawful motivation. Rather, the ALJ based his pretext finding on several factors that, when more closely analyzed, do not support a pretext finding.

1. The ALJ failed to acknowledge Nelson's admission that her violations of the Company's Code of Conduct warranted discharge

The Company clearly established that Nelson engaged in misconduct that violated the Company's Code of Conduct, as even Nelson admitted (Tr. pp. 124-125). In establishing the legitimate and non-discriminatory reasons for a discharging Nelson, the Company need only

prove that it had a reasonable belief that she engaged in misconduct, and that it acted on that belief in discharging her. See, e.g., *DTR Industries, Inc.*, 350 NLRB 1132, 1136-1135 (2007), enfd. 297 Fed. Appx. 487 (6th Cir. 2008) (dismissing Section 8(a)(3) complaint allegation where employer showed that it had reasonable basis to believe that employee engaged in misconduct and that it acted on that belief when discharging employee). Thus, an employer may discharge an employee for a good reason, a bad reason or no reason at all, as long as it does not discharge an employee for an unlawful reason. The Company presented overwhelming and, for the most part, undisputed evidence of its reason for discharging Nelson, yet the ALJ makes almost no reference to that evidence in his decision.

For example, in the mere 17 months that Nelson worked at the Tallahatchie Facility, the Company received 13 written complaints from employees about her disruptive, rude, belittling and unprofessional conduct, in addition to numerous verbal complaints from staff, including employees outside the Medical Department. Contemporaneous to Nelson's misconduct, the Medical Department was in crisis. As noted above, following an inmate's death in April 2008, the Receiver ordered immediate improvement in the Medical Department; otherwise, the Facility would lose its contract with the California Department of Corrections and Rehabilitation and face possible shutdown. One requirement was increased staffing of physicians and RNs. Nelson's outrageous misconduct had already caused two RNs to resign, and threatened to induce two others to follow.

Of significance, Nelson does not deny engaging in the misconduct for which she was discharged. Although Nelson attempted to explain away some of the written warnings issued to her by the Company, the evidence that Nelson was rude, inappropriate, bullying, and aggressive is undisputed and overwhelming. On Nelson's discharge, Warden Adams's testimony could not

have been clearer: Nelson was terminated because of her disruptive, argumentative and bullying conduct, which violated the Code of Conduct and threatened the California contract (Tr. pp. 254-255). In short, the two are the same—Nelson's inappropriate conduct recorded in the numerous complaints against her was a violation of the Code of Conduct.

The Code of Conduct requires employees to "help ensure a safe work environment that is free from unlawful discrimination and harassment, and characterized by respect and open communication," and the Facility Supplement to it requires employees to "support the efforts of other employees to carry out their duties and contribute to an atmosphere of mutual respect among employees and respect for employees by residents" and prohibits employees from using "physical violence, threats or intimidation toward fellow employees or visitors to the facility" (R. Exs. 19, pp. 6, 20; Tr. pp. 106-108). Nelson agreed to "abide by the policies and standards contained and referred to in the Code of Conduct" and understood that "failure to do so may result in disciplinary action, up to and including termination . . ." (R. Exs. 9-11; Tr. pp. 104-106). The Company does not have a progressive discipline policy and, thus, employees can be terminated without receiving prior discipline. Nelson admitted that her disruptive conduct in violated the Code of Conduct, for which she could have been terminated (Tr. pp. 124-125).

The Company also conducted an independent, impartial investigation into the circumstances surrounding Nelson's discharge and concluded that her termination was warranted (Tr. pp. 201-201, 393-394). The Company's impartial investigator interviewed all the witnesses identified by Nelson in her post-termination grievance (R. Ex. 24). Instead of revealing any ulterior motive for Nelson's discharge, the investigation confirmed that Nelson was guilty of multiple instances of misconduct that violated the Company's Code of Conduct and warranted discharge (R. Ex. 24; Tr. p. 204). Yet, despite the undisputed nature of this evidence, the ALJ

failed to consider or analyze it in either his finding that the General Counsel made an initial showing that Nelson's discharge was unlawfully motivated or in his finding that the Company's reasons for Nelson's discharge were pretextual.

The ALJ's failure to do so is yet another fatal flaw in his Decision because by ignoring this evidence, the ALJ failed to consider the only relevant inquiries during the Company's rebuttal case under *Wright Line*; that is, whether the Company's actions were reasonable under the circumstances, and whether the Company had a reasonable belief that Nelson engaged in misconduct, and whether acted on that belief in discharging her. Had the ALJ properly analyzed this evidence under *Wright Line*, the conclusion is inescapable that Nelson engaged in misconduct and that the Company relied on that misconduct as the sole basis for discharging Nelson. Thus, the Company has satisfied its rebuttal burden under *Wright Line* to show that it would have discharged Nelson even in the absence of her protected activity. *DTR Industries*, supra; *Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 (1999) (demonstrating reasonable, good-faith belief that employees had engaged in misconduct sufficient for employer to meet *Wright Line* rebuttal burden); *GHR Energy Corp.*, 294 NLRB 1011, 1012-1014 (1989), affd. mem. 924 F.2d 1055 (5th Cir. 1991). (employer met *Wright Line* rebuttal burden by showing that employees would have been disciplined even in the absence of their protected activities because employer reasonably believed they had engaged in serious misconduct).

2. The absence of evidence of disparate treatment indicates the Company's lawful motivation

There is absolutely no evidence that other employees, who engaged in a similar level of misconduct as Nelson's aggressive, rude, insubordinate, and bullying behavior, were treated more favorably. In fact, the record establishes that the Company has terminated other employees for engaging in disruptive behavior far less egregious than Nelson. Since January 2007, the

Facility has terminated, or allowed resignation in lieu of termination (as offered to Nelson), nine employees for insubordination, cursing a supervisor, failing to follow directives, unprofessional behavior and disrespectful conduct (R. Ex. 48). In sum, there is no evidence showing that Nelson was treated differently than other employees who engaged in similar misconduct, and, to the contrary, the evidence establishes that she was treated better than others.

Indeed, these employees were discharged for similar misconduct yet they had not engaged in concerted activities. Thus, this evidence shows that the Company consistently disciplined employees for the type of behavior Nelson engaged in regardless of whether they had also engaged in concerted activity. Despite this undisputed evidence, the ALJ failed to consider that the lack of evidence of disparate treatment demonstrates that the Company's decision to discharge Nelson was *lawfully* motivated. *Overnight Transportation Co.*, 343 NLRB 1431, 1434 (2004) (the absence of evidence of disparate treatment and lack of other evidence of pretext together with employer's proof that employees committed misconduct for which they could have been discharged sufficient to rebut General Counsel's *prima facie* case under *Wright Line*).

3. The ALJ erroneously concluded that the Company's reason for discharging Nelson was pretextual

The ALJ, despite the undisputed evidence that Nelson was disruptive and that her behavior admittedly violated the Company's Code of Conduct and warranted discharge, found that these reasons were "nothing more than a pretext" (ALJD 26:38). The factors relied on by the ALJ in his pretext finding, however, are inconsistent with the record and the undisputed testimony concerning Nelson's misconduct. For this reason, the Board should reject the ALJ's pretext finding, and instead find that the Company discharged Nelson for a legitimate, non-discriminatory reason—her disruptive behavior and her bullying and belligerent attitude toward her co-workers and the Company's supervisors.

a. Nelson Was Warned About Her Misconduct

The ALJ found that the Company failed to warn Nelson about the seriousness of her misconduct (ALJD 25:22-24) and that the Company did not consider the numerous instances of Nelson's misconduct as serious enough to warrant discipline (ALJD 26:22-24). The testimony, however, is undisputed that Nelson was counseled on several occasions by Warden Adams, on a few occasions by Health Services Administrator Johnson, and by Assistant Warden Jackson (Tr. pp. 210, 237-239, 244-245, 254-255, 289-290, 294-295). Regardless of the form of the counselings, whether they were verbal, written, memoranda or Problem Solving Notices, the purpose of the communication was served when Nelson received notice that she must cease engaging in the particular misconduct. Thus, as Warden Adams explained, Nelson was actually treated better than other employees in light of the numerous opportunities Nelson received to cease her disruptive conduct (Tr. p. 254). The ALJ's finding that Nelson was not counseled for her previous misconduct and that the Company failed to take disciplinary action in response to her misconduct is at odds with the undisputed testimony, and should be reversed.

b. Nelson's Performance Evaluations and Johnson's Job Recommendation for Nelson Are Not Indicative of Pretext

As discussed above, Johnson and Nelson were close friends. This close relationship manifested itself in Johnson's performance evaluations of Nelson, as well as in Johnson's job recommendation for Nelson. Warden Adams only discovered how truly close the relationship was between them at about the time he learned of Nelson's altercation with Clinical Nurse Supervisor Strong on June 18, 2008 (Tr. p. 288). Adams testified that he expected the Facility's Department Heads to do their job, and when he discovered Johnson's friendship with Nelson, he issued Johnson a verbal counseling regarding her interaction with Nelson (Tr. p. 288). As Warden Adams testified, the friendship led to Johnson's failure to hold Nelson accountable for

her misconduct (Tr. p. 254). Due to the fact that Warden Adams was unaware of Johnson's friendship with Nelson when Johnson prepared Nelson's performance evaluation, it is reasonable to conclude that Adams believed that the evaluation was based on legitimate workplace criteria rather than upon Johnson's relationship with Nelson. Accordingly, the ALJ placed too great a weight on both the performance evaluation and the job recommendation in finding that the Company's reasons for Nelson's discharge were pretextual.

c. The ALJ Improperly Inferred an Unlawful Motive From The Company's Legitimate Practice Concerning Exit Interviews

The ALJ found that Warden Adams' failure to discuss the numerous incidents of Nelson's misconduct with her during the discharge meeting and Warden Adams' failure to raise the departure of two RNs, who attributed their resignations to Nelson's misconduct, with Nelson as a basis for her discharge indicates that these incidents was not the real reason for Nelson's discharge (ALJD 25:33–26:20). As Warden Adams explained, however, he does not review each factor leading to an employee's termination during his exit interviews (Tr. pp. 292-293). Warden Adams testified that it is unethical, under the Company's policies, to show an employee the complaint forms in which co-workers complained about that employee; thus, he never does so (Tr. pp. 279, 291-292). Warden Adams also testified that the RN staffing levels at the Facility were under intense scrutiny by the Receiver (Tr. pp. 251-253). The ALJ failed to consider Warden Adams' undisputed testimony that two RNs had already departed because of Nelson's misconduct and two more RNs were threatening to quit (Tr. pp. 235-236, 245-249, 311-313, 347-348, 352-353), and that because of these resignations, the Facility's contract was in jeopardy (Tr. pp. 196-197, 251-253). On the reasons for Nelson's discharge, however, the record could not be clearer: Nelson was discharged because of her disruptive, argumentative and bullying conduct, which violated the Code of Conduct and threatened the California Contract (Tr. pp.

254-255). Nelson herself admitted that her misconduct was a dischargeable offense under the Company's Code of Conduct (Tr. pp. 124-125). Thus, the ALJ inappropriately inferred, from the Company's legitimate business practice, that Nelson's misconduct was not the real reason for Nelson's discharge. This inference is against the weight of the evidence and should be rejected.

d. The Company Did Not "Seize Upon" an Incident Involving Nelson and a Supervisor as a Pretext For Discharging Nelson

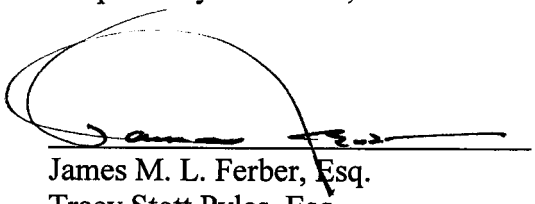
As discussed above, the July 29, 2008 altercation between Nelson and Clinical Nurse Supervisor Strong was the triggering event for Nelson's discharge. The record overwhelmingly shows that Nelson violated the Code of Conduct by her actions on July 29, and the Company decided to discharge Nelson the next day, immediately after Clinical Nurse Supervisor Strong filed her complaint and Dr. Layne corroborated Strong allegations. Additionally, the Facility had already lost two RNs because of Nelson's misconduct, which put the Company in the position of losing its California contract (Tr. p. 255). Accordingly, the Company decided that "enough was enough" (Tr. p. 254). The Company had tried everything to correct Nelson's behavior and attitude problems but nothing worked. Warden Adams had given Nelson "more chances that anybody in that facility" to improve her conduct, but she had failed to do so (Tr. p. 254). Had the Company wanted to discharge Nelson because of her concerted activities it could have done so numerous times prior to August 1, 2008 (Tr. p. 256). Given that Nelson's discharge was proximate in time to a serious, and admitted, violation of the Company's Code of Conduct and that Nelson had a long history of misconduct, for which she had been warned numerous times to correct, there is no basis for inferring that the Company simply waited for an opportunity to "seize upon" Nelson's altercation with Strong in order to mask its true motive for Nelson's discharge. *Woodruff & Sons, Inc.*, 265 NLRB 345, 347 (1982), enfd. sub nom. *Scurek v. NLRB*, 717 F.2d 1480 (D.C. Cir. 1983) (finding that where the record overwhelmingly substantiates the

employer's basis for discharge, timing alone is insufficient to infer that the discharge was unlawfully motivated). It is abundantly clear and undisputed that Nelson engaged in misconduct that violated the Company's Code of Conduct and threatened the Company's California contract; thus, the record overwhelmingly substantiates the Company's position that Nelson was discharged solely for that misconduct.

IV. CONCLUSION

For all of the foregoing reasons, the Company respectfully requests that the Board reverse the ALJ's Decision and dismiss the Complaint in its entirety.

Respectfully submitted,



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Dated: May 1, 2009

Attorneys for Respondent Corrections Corporation of America

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May, 2009, the foregoing was filed with the Executive Secretary's Office of the National Labor Relations Board, electronically by using the E-Filing system on the Board's website, and that on this same date an original and eight paper copies were served by overnight mail, prepaid, upon:

Les Heltzer, Executive Secretary
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Washington, DC 20570-0001

And on this same date the foregoing was served via electronic mail and by overnight mail, pre-paid, upon the following:

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And on this same date the foregoing was served via overnight mail, prepaid, upon the following:

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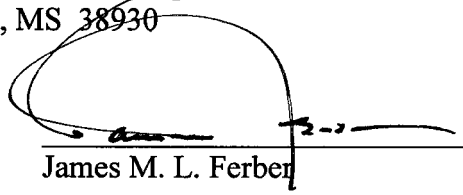

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